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QUESTION PRESENTED

Whether federal statutes and regulations relating to railroad-highway grade crossings preempt a state law cause of action against a railroad based on the alleged breach of the railroad's duty to provide adequate safety devices at grade crossings.¹

¹ This brief does not address the other question presented by this case, namely: Whether federal regulations setting speed limits for trains on all classes of track nationwide preempt a state law cause of action against a railroad for operating its trains at unreasonable speeds.

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INTEREST OF THE AMERICAN AUTOMOBILE
ASSOCIATION

The American Automobile Association ("AAA"), a not-for-profit corporation, represents more than 33 million motorists in the United States and Canada.² Eighteen percent of the U.S. driving population are AAA members, and 21 percent of all cars registered in the U.S. belong to AAA members. These members are served by a network of more than 1,000 AAA offices, which provide travel, insurance, financial, and automobile services. AAA is also one of the largest travel information publishers in the world, producing more than 350 million copies of travel-related publications annually.

Since its founding in 1902, AAA has been a leading advocate for motorist and pedestrian safety. The AAA-sponsored School Safety Patrol—children protecting their classmates from traffic dangers—was established in 1920 and has become a nationwide movement of a half million volunteers. AAA was among the first to introduce traffic safety education into elementary and junior high schools. AAA also pioneered driver education in high schools, driver testing, and training of driver education teachers. During the 1930's, AAA became involved in improvement of pedestrian safety and inaugurated its annual Pedestrian Safety Inventory—a program recognizing cities and states for outstanding pedestrian safety records.

AAA has a strong interest in this case because of the impact the Court's decision will have on traffic

² AAA has obtained written consent from both parties to file this brief. Copies of the letters of consent have been filed with the Clerk pursuant to United States Supreme Court Rule 37.

safety. Railroad-highway grade crossings present a substantial danger to AAA's members, and to the motoring public generally. The outcome of this case could determine whether railroads have any responsibility to ensure that grade crossings are safe.

SUMMARY OF THE ARGUMENT

The Federal Railroad Safety Act of 1970 authorized the Secretary of Transportation to make rules and regulations for all areas of railroad safety. However, Congress explicitly permitted states to adopt or continue in force any law relating to railroad safety until the Secretary has adopted a rule or regulation covering the subject matter of the state law.

The Secretary has not adopted rules or regulations requiring *any* safety devices at grade crossings that have not been improved with federal funds. None of the regulations issued under the Railroad Safety Act relates to grade crossings. The Secretary has promulgated regulations concerning grade crossings under the Highway Safety Act of 1973. However, those regulations pertain *only* to grade crossings involved in federally-funded highway projects. The regulations do not cover crossings that, like the one in this case, have not been improved with the use of federal funds. The Secretary has also incorporated into the Code of Federal Regulations the Manual on Uniform Traffic Control Devices. The Manual provides standards for the design of grade crossing safety devices, but does not mandate the use of safety devices at particular crossings.

Preservation of state law tort actions against railroads is consistent with Congress' purpose in enacting the Railroad Safety Act, which was "to promote

safety in all areas of railroad operations and to reduce railroad-related accidents." Preemption of state laws would immunize railroads from potential tort liability and would thus diminish the incentive of railroads to maintain adequate warning devices. Indeed, because no federal statute or regulation requires safety devices at crossings that are not a part of federally-funded projects, preemption of state laws would permit railroads to leave such crossings completely unprotected.

ARGUMENT

I. STATE LAWS REGULATING MATTERS OF TRADITIONAL STATE CONCERN ARE PRESUMED VALID ABSENT A CLEAR AND MANIFEST INTENTION OF CONGRESS TO PREEMPT THEM

Under the Supremacy Clause of the Constitution, art. VI, cl. 2, state laws that "interfere with, or are contrary to the laws of congress, made in pursuance of the constitution," are invalid. *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1, 211 (1824). The question presented in this case is whether federal law preempts a state law cause of action against a railroad for alleged negligence in failing to provide adequate safety devices at grade crossings. The provision of remedies for acts of negligence is traditionally a matter of state concern. See, e.g., *Cincinnati, New Orleans, & Texas Pacific Ry. v. Bohon*, 200 U.S. 221, 226 (1906). A presumption exists against finding preemption of state law in areas traditionally regulated by the states. *California v. ARC America Corp.*, 490 U.S. 93, 101 (1989). In such situations, congressional intent to supersede state law must be "clear and manifest." *English v. General Electric Co.*, 496 U.S. 72, 79 (1990). In this case, accordingly, state law must be

presumed valid, unless it is shown that preemption is consistent with the clear and manifest intent of Congress.

II. FEDERAL LAW HAS NOT PREEMPTED STATE LAWS REQUIRING RAILROADS TO PROVIDE ADEQUATE SAFETY DEVICES AT GRADE CROSSINGS THAT HAVE NOT BEEN IMPROVED WITH FEDERAL FUNDS

The Petitioner/Cross-Respondent, CSX Transportation, Inc., cites three sources of federal law which, in its view, preempt state law: (1) the Federal Railroad Safety Act of 1970; (2) regulations implementing the Highway Safety Act of 1973; and (3) the federal Manual on Uniform Traffic Control Devices. Contrary to CSX's view, none of these laws explicitly or implicitly preempts state laws of the type involved in this case. In fact, none of these federal laws purports to address the subject matter of the pertinent state law—the requirement to provide safety devices at a grade crossing that has not been improved with federal funds.

A. The Federal Railroad Safety Act Expressly Preserves State Laws Until They Are Displaced by Federal Regulations Covering the Same Subject Matter

The Federal Railroad Safety Act of 1970, Pub. L. No. 91-458, 84 Stat. 971, authorized the Secretary of Transportation ("Secretary") to promulgate rules, regulations, and standards for all areas of railroad safety, "supplementing provisions of law and regulations in effect on the date of enactment [October 16, 1970]." 45 U.S.C.A. §431(a) (1992). Section 205 of the Act expressly permits states to "adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State

requirement." 45 U.S.C.A. §434 (1992). Thus, Congress explicitly chose *not* to preempt state railroad safety laws until the Secretary adopted a rule "covering" the same "requirement."

The determinative question in this case is whether the Secretary has adopted regulations covering the requirement to provide adequate safety devices at grade crossings that, like the one here, have not been improved with federal funds. The answer is no. The Secretary has not used the rulemaking authority granted by the Railroad Safety Act to promulgate *any* regulations regarding grade crossings. See 49 C.F.R. §§200-240 (1992). It is clear, therefore, that the Railroad Safety Act has not resulted in the preemption of *any* state law.

B. Regulations Implementing the Highway Safety Act Are Inapplicable to Grade Crossings That Have Not Been Improved with Federal Funds

The Secretary has adopted certain regulations relating to grade crossings in connection with federally-funded highway projects. Those regulations were issued under the authority of the Highway Safety Act of 1973. Pub. L. No. 93-87, 87 Stat. 282. The Highway Safety Act established a safety program for grade crossings. See 23 U.S.C.A. §130 (1992). That program provides states with federal funds "for the elimination of hazards of railway-highway crossings." 23 U.S.C.A. §130(a) (1992). In order to participate in the program, states are required to "conduct and systematically maintain a survey of all highways to identify those railroad crossings which may require separation, relocation, or protective devices, and establish and implement a schedule of projects for this purpose." 23 U.S.C.A. §130(d) (1992). The states are then eligible

to use federal highway funds to aid the improvements. 23 U.S.C.A. §130(a) (1992).

The regulations which the Secretary has issued pursuant to the Highway Safety Act govern the selection of warning devices at grade crossings that are improved with the use of federal funds. 23 C.F.R. §646.214(b) (1992). For projects involving federal money, the Secretary requires installation of "automatic gates with flashing light signals" whenever specified conditions exist at the crossing, such as multiple main line tracks. 23 C.F.R. §646.214(b)(3)(i) (1992). These regulations are inapplicable to grade crossings that, like the one in this case, have not been improved with federal funds. The regulations do not "cover," and therefore do not preempt, state laws respecting grade crossings that do not involve federal funds.

C. The Manual on Uniform Traffic Control Devices Does Not Require the Use of Safety Devices at Grade Crossings

In 1974, the Secretary incorporated into the Code of Federal Regulations the Manual on Uniform Traffic Control Devices ("MUTCD"). See 23 C.F.R. §§655.601-655.603 (1992). The MUTCD established national standards for highway traffic signals and warning devices. *Id.* In 1977 the MUTCD was amended to include standards for traffic control devices at railroad grade crossings. MUTCD §1A-4.

The MUTCD merely provides standards for the "design and application" of traffic control devices. *Id.* It does not provide any rules or guidelines as to which safety devices are to be used at particular crossings. The MUTCD states only that "[t]he decision to use a particular device at a particular location should be

made on the basis of an engineering study of the location." *Id.*

The MUTCD is not relevant here. This case concerns the duty to select and install adequate safety devices at grade crossings. The MUTCD does not require the use of *any* safety devices; it merely prescribes the form of the devices when they are used. Therefore, the MUTCD does not preempt state laws imposing a duty of care upon railroads in selecting the safety devices to be used at grade crossings.

III. PRESERVATION OF STATE LAW TORT ACTIONS AGAINST RAILROADS IS CONSISTENT WITH CONGRESS' PURPOSE OF PROMOTING RAIL SAFETY

This Court recently restated the proposition that "the purpose of Congress is the ultimate touchstone of preemption analysis." *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2617 (1992); see also *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978); *Retail Clerks Intl. Ass'n v. Schermerhorn*, 375 U.S. 96, 103 (1963). Discerning Congress' intent requires examination of the explicit statutory language and the structure and purpose of the statute. *Ingersoll-Rand Co. v. McClendon*, 111 S. Ct. 478, 482 (1990).

Both the terms and the legislative history of the Railroad Safety Act demonstrate that the overriding concern of Congress was to improve railroad safety. In Section 101 of the Act, Congress declared that its purpose was "to promote safety in all areas of railroad operations and to reduce railroad-related accidents." 45 U.S.C.A. §421 (1992).

The legislative history reveals that Congress was particularly concerned with the rising number of deaths at railroad crossings. The report of the Inter-

state and Foreign Commerce Committee of the House of Representatives states:

The committee is aware that grade crossing accidents constitute one of the major causes of fatalities connected with rail operations. The need to do something about these terrible accidents which have one of the highest incidents of death and serious injury per accident, necessitates an immediate attack on the grade crossing problem as soon as possible.

H.R. Rep. No. 1194, 91st Cong., 2d Sess., *reprinted* in 1970 U.S. Code Cong. & Admin. News 4104, 4116.

Twenty-two years after enactment of the Railroad Safety Act, railroad grade crossings remain dangerous places. According to statistics compiled by the Federal Railroad Administration, in 1990 there were 5,713 accidents at grade crossings in the United States, resulting in 698 deaths and 2,407 injuries. Fed. R.R. Admin., *Rail-Highway Crossing Accident/Incident and Inventory* Bulletin No. 13, at 2 (1991). One of the best predictors of train-vehicle accidents at grade crossings is the type of warning devices installed. See Fed. Highway Admin., *Rail-Highway Crossings Study*, at 2 (1989). Despite the importance of warning devices, 67 percent of the 176,572 public grade crossings in the United States are not equipped with active warning devices (gates, flashing lights, bells, or highway signals). See Fed. R.R. Admin., *Rail-Highway Crossing Accident/Incident and Inventory* Bulletin No. 13, at 59 (1991).

Preemption of state law tort actions against railroads would impair, rather than promote, efforts to

improve safety at grade crossings. Railroads, because of their expertise and familiarity with local conditions, are in the best position to identify and correct safety problems at grade crossings. Immunizing railroads from potential tort liability would undermine highway safety by diminishing their incentive to maintain adequate warning devices. Indeed, because no federal statute or regulation requires safety devices at crossings that are not a part of federally-funded projects, preemption of state laws would permit railroads to leave such crossings completely unprotected. This would turn Congress' purpose in enacting the Railroad Safety Act on its head. Since congressional purpose is the "touchstone" of preemption analysis, preemption is clearly inappropriate in this case.

CONCLUSION

This Court should affirm the court of appeals' holding that federal law does not preempt a railroad's state law duty to provide adequate warning devices at a grade crossing that has not been improved with federal funds.

Respectfully submitted,

PAUL R. VERKUIL, ESQUIRE
Counsel of Record

President
AMERICAN AUTOMOBILE ASSOCIATION
1000 AAA Drive
Heathrow, Florida 32746
407-444-7111
Counsel for Amicus Curiae